provisions to the taxpayers' ordinary income. The United States argued that the moneys received by virtue of a partial-payment provision, identical with the one involved in the instant proceedings, were the result of completed sales and constituted income to the taxpayer. In its rejection of this argument, that court characterized this transaction as a financing arrangement in the nature of a loan and not a transfer of ownership.

This problem of conflicting interpretations by various state courts of applicable federal law takes on added importance when viewed in the light of the magnitude of United States government contracts containing these or similar provisions. This Court should resolve this problem.

The Illinois Supreme Court opinion did not discuss the question of whether the contractor in this case was an "owner" within the meaning of the Illinois tax statute, but rather devoted the entire opinion to the question of federal immunity. This possibly represents that court's view that unless federal immunity were established the property would be taxable. In any event, there are no adequate state grounds recited which would support the decision independently of the federal question.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL P. WARD,
State's Attorney of Cook County, Illinois,

EDWARD J. HLADIS,
Chief of Civil Division,
507 County Building,
Chicago 2, Illinois,
Attorneys for Petitioners.

July 13, 1964.

APPENDIX A.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

IN THE CIRCUIT COURT OF COOK COUNTY.

In Chancery.

Ford Motor Company,
Plaintiff,
vs.
Bernard J. Korzen, County Treasurer and ex-officio County Collector of Cook County, Illinois, Edward J. Barrett, County Clerk of Cook County, Illinois, Daniel P. Ward, State's Attorney of Cook County, Illinois, County of Cook, a municipal corporation,
Defendants,
vs.
United States of America,
Intervening-Plaintiff.
} No. 59 C 10110

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECREE.

Brothers, Wm. V., Circuit Court Judge: This matter coming on to be heard on the:

Complaint In Chancery For Injunction, filed July 21, 1959,

Answer To Complaint In Chancery For Injunction, filed August 20, 1959,

Complaint In Chancery In Intervention Of The United States Of America, filed November 10, 1959,

Answer To Complaint In Chancery In Intervention Of The United States Of America, filed December 22, 1959,

Supplement To Complaint In Chancery For Injunction filed July 1, 1960,

Supplement To Complaint In Chancery In Intervention Of The United States Of America, filed as of July 1, 1960,

Answer To Ford Motor Company Supplement To Complaint In Chancery For Injunction, filed September 15, 1960, and

Answer To Supplement To Complaint In Chancery In Intervention Of The United States Of America, filed September 15, 1960; and

The Court having on May 15, 1962 entered an order that Bernard J. Korzen and Daniel P. Ward be named as defendants herein in the place of Francis S. Lorenz and Benjamin S. Adamowski, respectively, and having directed that all pleadings theretofore filed herein by any of the parties are deemed amended on their face to make such changes, and having directed that such pleadings shall in all respects be treated as if originally filed by or against such successor defendants; and

The plaintiff, hereafter called Ford, the defendants, and the intervening-plaintiff, hereafter called the United States, having heretofore entered into a Stipulation Of Facts dated February 15, 1962, which was filed herein on the same date and made a part of the record herein; and

The parties having filed herein their briefs or memoranda as follows:

Plaintiff's Brief;
Supplement To Plaintiff's Brief;
Defendants' Brief;
Plaintiff's Reply Brief; and
Memorandum of United States of America;

and

This matter having come on to be heard on the merits on November 28, 1962, and the Court and the parties having considered said Stipulation Of Facts for the purposes of this cause and in particular, for the purposes of the aforesaid pleadings, and no party having made objection to any part of such stipulation for irrelevancy, and each party having declined to offer further evidence supplementary to, and having elected to rest on, the stipulated statement of facts contained in said Stipulation Of Facts, and the Court having declared proofs closed; and

The Court having considered the aforesaid pleadings, the aforesaid Stipulation Of Facts, the briefs or memoranda filed by the parties, and the statements of the parties, and the Court being advised in the premises, the Court now makes the following Findings of Fact and Conclusions of Law:

Findings of Facts.

1. Ford is a corporation organized and existing under the laws of the State of Delaware and duly qualified and authorized to transact business in the State of Illinois, and on April 1, 1958 owned, used or controlled personal property in the County of Cook and State of Illinois.

2. The defendant Bernard J. Korzen is the Treasurer and ex-officio County Collector of the County of Cook,

State of Illinois, and as such officer has the duty of collecting taxes extended in the tax warrant books delivered into his custody.

3. The defendant Edward J. Barrett is the County Clerk of the County of Cook, State of Illinois, and as such officer has the duty of extending taxes based on the several assessments made against Ford's personal property.

4. The defendant Daniel P. Ward is the State's Attorney of the County of Cook, State of Illinois, and as such officer has the duty to appear for the County of Cook in all legal proceedings involving collection of taxes and to take all steps necessary to enforce payment thereof.

5. All interest, penalties, printers' fees and costs collected by the County Collector of Cook County on account of delinquent taxes are in accordance with law paid into the County Treasury of the County and used for County purposes.

6. A short time prior to July 2, 1958 Ford received from the Assessor of Cook County, State of Illinois, a direction in writing that taxpayers who possessed personal property of the United States return the value of such property when submitting their personal property schedules for the year 1958 to Cook County.

7. On July 2, 1958 Ford filed with the Assessor of the County of Cook, State of Illinois, a document entitled County of Cook—State of Illinois, Personal Property Tax Return for Corporation—1958. In the heading of the Return the following appeared:

> "Ford Motor Company, 75th & Cicero, Chicago, Illinois, Type of Business . . . Aircraft Engines—Federal Contracts."

This property is known as Air Force Plant No. 39. A portion of the Return was entitled "Schedule Of Personal

Property As Of April 1, 1958." The schedule included therein the following items:

Item No.	Owner's Valuation
1. Automobiles	36,712
2. Trucks, Busses, Tractors	21,414
12. Money-Cash and Bank Deposits	4,167
Total Full Value	62,293

In response to a question at the bottom of the first page of the Return entitled "Interrogatories (Must be Answered)."

> "1. On April 1, 1958, did the above named corporation use or control any personal property of others, other than leased machinery and equipment? Yes (Yes or No). If so, file separate return and indicate name and address under which filed", Ford said "See statement attached."

The statement attached, to which reference was made, was as follows:

> "Statement of Ford Motor Company
> In Answer to Interrogatory No. 1
>
> "Ford Motor Company, Aircraft Engine Division, occupies Air Force Plant No. 39, 7401 S. Cicero Avenue, Chicago, Illinois, as a prime contractor engaged in the manufacture of certain aircraft engines and spare parts for the United States Air Force under various prime contracts. On April 1, 1958 Ford Motor Company at that location held, for the performance of said contracts, certain parts, materials, inventories, work in process, equipment, and other personal property the title to which was vested solely in the United States Government. This property is exempt from ad valorem taxation in Illinois by virtue of the Constitution of the United States of America and Section 19 of the Illinois Revenue Act of 1939. Further, the laws of the State of Illinois governing the listing of property for taxation do not require the listing of the said personal property by Ford Motor Company.

"Ford Motor Company, involuntarily and under duress and the compulsion of penal provisions of the Illinois Revenue Act of 1939 (including, without limitation, sections 54, 56 and 325 thereof), and the threat of the Assessor of Cook County, Illinois, to invoke the said penalty provisions should the Company fail to include on this return the personal property described in the above paragraph, hereby schedules the following property belonging to the United States Government:

Item No.	
8. Office and Store Furniture and Fixtures	$ 170,000
10. Machinery and equipment, including Tractors	9,300,000
11. Merchandise, Goods on Hand and in Process	14,400,000
15. All other Personal Property (Special Tools and bailed property)	7,300,000
Total	$31,170,000"

Ford did not list Items Nos. 8, 10, 11, and 15 voluntarily and did not consent that they be assessed by the Assessor of Cook County, State of Illinois, and did not consent to pay a personal property tax on such Items. When the Return was audited by the office of the Assessor of Cook County, he carried forward to page 1 of the Return and included in the portion thereof entitled Schedule of Personal Property as of April 1, 1958, each of the four items shown on the above "Statement of Ford Motor Company in Answer to Interrogatory No. 1." Specifically, he placed these figures under Items Nos. 8, 10, 11, and 15, respectively, under the heading "Full Value as Fixed by Assessor," in the aggregate total of $31,170,000. The property of Ford listed in Items Nos. 1, 2, and 12 were also carried into the column headed "Full Value as Fixed by Assessor" in the

aggregate sum of $62,293. Thus the Assessor arrived at a total full value of $31,232,293. This assessment of $31,232,293 was certified by the Assessor and confirmed by the Board of Appeals of the County of Cook, State of Illinois.

8. As required by the laws of the State of Illinois, the Illinois State Department of Revenue determined that the assessments of personal property so made for the year 1958 by the Assessor of Cook County and approved by the Board of Appeals must be equalized by the application of a multiplier, directed to be 1.45. When the property shown in Items Nos. 8, 10, 11, and 15, above, totalling $31,170,000, is multiplied by 1.45 the total as thus equalized is $45,196,500.

9. The 1958 tax rate applicable to personal property at 75th Street and Cicero Avenue, in the City of Chicago, County of Cook, is $4.23 per $100 of assessed valuation. When this $4.23 is applied to the equalized value of the said property shown in Items Nos. 8, 10, 11, and 15 of the Return at 75th Street and Cicero Avenue, Chicago, Illinois, of $45,196,500, a tax of $1,911,811.95 results.

10. The total of $62,293 of said Items Nos. 1, 2, and 12 listed as Ford property, as indicated above, was multiplied by the said multiplier of 1.45, the total as thus equalized being $90,325. When the said 1958 tax rate of $4.23 is applied to said equalized value of $90,325, a tax of $3,820.75 results.

11. When the total of $62,293 of said Items Nos. 1, 2, and 12, and the total of $31,170,000 of said Items Nos. 8, 10, 11, and 15, all as fixed by the Assessor of Cook County, are multiplied by the said multiplier of 1.45, the total as thus equalized is $45,286,825. When the 1958 tax rate of $4.23 is applied to this equalized value, a tax of $1,915,632.70 results.

12. The aforesaid assessments made by the Assessor of Cook County totalling $31,232,293 for all the personal property shown at 75th Street and Cicero Avenue, Chicago were in fact used by the defendant Edward J. Barrett, County Clerk of Cook County, Illinois, for the application of the multiplier of 1.45, resulting in an assessed valuation as equalized by order of the State Department of Revenue of $45,286,825. The said defendant Edward J. Barrett then extended taxes on said $45,286,825 at the rate of $4.23 per $100 of assessed valuation, thus resulting in an extended tax of $1,915,632.70. Ford has received a 1958 personal property tax bill addressed to Ford Motor Company, 7401 South Cicero Avenue, Chicago 29, Illinois, bearing identifying symbols 31 7201, Volume 69, Item 315, and showing assessed valuation as equalized by order of the State Department of Revenue, of $45,286,825, and a tax of $1,915,632.70.

13. Ford has heretofore paid on account of said 1958 personal property tax bill $3,820.75, representing the full amount of the tax payable as aforesaid on said Items Nos. 1, 2, and 12.

14. No payments have been made by Ford or by any other person on account of that portion of said bill attributable to said Items Nos. 8, 10, 11, and 15.

15. All of the personal property located on April 1, 1958 at said Air Force Plant No. 39, 75th Street and Cicero Avenue, Chicago, Illinois, and returned in Items Nos. 8, 10, 11, and 15 of the said Personal Property Tax Return for Corporation—1958 of Ford, was acquired, paid for by the United States Air Force, and held by Ford on such date pursuant to bailment contracts, the Spare Parts for J 57 Engines contracts, Acquisition of Facilities contracts, or J 57 Engines and Special Tooling contracts in effect April 1, 1958 between Ford and the United States Air Force,

and was used or held on April 1, 1958 by Ford solely for the performance of said contracts, under the direct supervision and control of the United States Government. Each of said contracts contained provisions identical or substantially identical with those set out in the respective exhibit attached to said Stipulation of Facts dated February 15, 1962 relative to the respective contract.

16. On April 1, 1958 it was the practice of the Assessor of Cook County, Illinois, not to assess to a person, firm, or corporation in such County personal property in the possession of such person, firm, or corporation in such County if such person, firm, or corporation was not the owner thereof on such date.

Conclusions of Law.

1. This Court has jurisdiction of all parties to this cause and of the subject matter thereof.

2. The United States Government was the owner on April 1, 1958 of the aforesaid personal property listed in said Return as Items Nos. 8, 10, 11, and 15 and located on April 1, 1958 at said Air Force Plant No. 39, 75th Street and Cicero Avenue, in the City of Chicago, County of Cook, and State of Illinois.

3. Illinois law does not authorize ad valorem taxation of possessory interests in personal property, and personal property of the United States in the hands of its bailee in Cook County, Illinois, is exempt from ad valorem taxation. The laws of the State of Illinois governing the listing of personal property for taxation did not require that Ford list the aforesaid personal property of the United States shown as Items Nos. 8, 10, 11, and 15 in said Return. Ford listed such items involuntarily and under duress and under the compulsion of the penal provision of the laws of the State of Illinois.

4. The aforesaid personal property of the United States listed as Items Nos. 8, 10, 11, and 15 in said Return, located on April 1, 1958 at Air Force Plant No. 39, 75th Street and Cicero Avenue, in the City of Chicago, County of Cook, and State of Illinois, was exempt from personal property taxes in Illinois by virtue of the Constitution of the United States of America and of Section 19 of the Illinois Revenue Act of 1939, being Section 500 of Chapter 120, Revenue, Illinois Revised Statutes, 1957.

5. The United States has not permitted its aforesaid property listed as aforesaid as Items Nos. 8, 10, 11, and 15 in said Return, located on April 1, 1958 at said Air Force Plant No. 39, 75th Street and Cicero Avenue, in the City of Chicago, County of Cook, and State of Illinois, to be taxed as heretofore described in the County of Cook and State of Illinois.

6. The payment of $3,820.75 heretofore made by Ford on account of its said 1958 personal property tax bill of $1,915,632.70 constitutes payment in full of all personal property taxes for the year 1958 legally levied against Ford on property at 75th Street and Cicero Avenue, in the City of Chicago, County of Cook, and State of Illinois.

7. Ford has no adequate remedy at law.

8. All the material allegations in the Complaint have been proved and are true and the equities of the cause are with Ford.

9. Ford is entitled to the issuance of a decree and an injunction in its favor and against the defendants, and Ford has shown good cause for the granting of such injunction without bond.

Final Decree.

It Is, Therefore, Ordered, Adjudged, and Decreed That:

1. The lien of 1958 taxes against the personal property of Ford located at 75th Street and Cicero Avenue, in the City of Chicago, County of Cook, and State of Illinois, together with interest, penalties, costs, and printers' fees, has been fully satisfied, and such lien is hereby extinguished and discharged.

2. Bernard J. Korzen, County Treasurer and ex-officio County Collector of Cook County, Illinois, Edward J. Barrett, County Clerk of Cook County, Illinois, Daniel P. Ward, State's Attorney of Cook County, Illinois, and the County of Cook, a municipal corporation, defendants herein, and their respective attorneys, agents, and servants, and all persons acting on behalf of them and each of them, and the successors in office of each of them, are hereby permanently enjoined and restrained from collecting; or attempting to collect from anyone, by any method, or in any manner whatsoever, any further amount with respect to said 1958 personal property tax bill of Ford for the property at 75th Street and Cicero Avenue, in the City of Chicago, County of Cook, and State of Illinois, or with respect to any further or additional personal property taxes for the year 1958 or interest, penalties, printers' fees, or costs related thereto on any property at said location, and a writ of injunction issue out of this Court in conformity with this decree.

3. All costs herein are assessed against Ford, and the same have been fully paid and are hereby satisfied of record.

Enter:

.....

Judge.

APPENDIX B.

OPINION OF THE ILLINOIS SUPREME COURT.

Docket No. 37908—Agenda 62—September, 1963.

Ford Motor Company, Appellee, v. Bernard J. Korzen, County Treasurer, et al., Appellants.—(United States of America, Intervenor-Appellee.)

Mr. Justice Solfisburg delivered the opinion of the court:

This case presents the question of whether certain personal property in the possession of the plaintiff Ford Motor Company is exempt from taxation because title to the property is in the plaintiff-intervenor, United States of America.

Ford commenced an equitable action in the circuit court of Cook County seeking to restrain the defendants from collecting personal property taxes upon the subject property in the principal amount of $1,911,811.95. The action was based upon the theory that the property was owned by the United States and therefore was exempt from taxation. The United States has intervened as a party plaintiff.

The case was tried upon a stipulation of facts and the trial court concluded that the United States was the owner of the property in question and that the property was therefore exempt from taxation by virtue of the constitution of the United States and section 19 of the Revenue Act. (Ill. Rev. Stat. 1957, chap. 120, par. 500.) The trial court entered a decree granting injunctive relief and defendants have appealed directly to this court.

Defendants contend that the United States holds mere legal title to the property in question, and that such title does not warrant exemption under section 19 of the Revenue Act. They further contend that Ford, rather than the United States, has such ownership in the property to support a valid tax by Cook County without invading the constitutional rights and immunities of the United States.

Plaintiffs insist, however, that the United States was the owner of the property, and that the possessory interest of Ford as a bailee was not subject to tax under Illinois law and was immune from tax under the Federal constitution. Plaintiffs further contend that a tax upon such property would constitute unlawful discrimination against the United States.

On April 1, 1958, the disputed property was in the possession of Ford in Illinois, and legal title was in the United States pursuant to four types of contracts between Ford and the United States Air Force.

The first type of contract is a simple bailment of government property loaned to Ford. Defendants now concede that this property is not taxable and that the collection of the part of the tax attributable to such property was properly enjoined.

The other three contracts deal with items to be manufactured by Ford or acquired by it from nongovernmental sources for the performance of these interrelated contracts. These contracts relate to (1) the manufacture of spare parts, (2) the acquisition of facilities, and (3) the manufacture of engines and acquisition of special tooling.

The spare parts contract and the engine and special tooling contract contain a "Progress Payment Clause." In this clause, a progress payment is defined as a payment "prior to acceptance". This clause prescribes that title to all material of every description, and at whatever stage of

manufacture, which is in the plaintiff's possession and is applicable to these contracts, passes from Ford to the Air Force upon the making of the first progress payment, and title to any such material thereafter acquired or produced by Ford passes to the Air Force upon its acquisition or production by the plaintiff. Before a progress payment can be made, there must be a representation and warranty by the contractor that the property is free and clear of all liens and encumbrances of every kind. In addition to the title-vesting language, the progress payment clause contains elaborate and detailed provisions concerning the possession, use, control, risk of loss, and right of rejection of such material.

Ford is in possession of the material until acceptance of the finished items by the Air Force, and bears the risk of loss, destruction or damage of all materials. Plaintiff Ford has control of the manner in which these materials are applied in the performance of the contracts. It has the right to dispose of current production scrap, subject to the provision that it must credit the Air Force with the amount received therefor. Ford has the right to use the material or dispose of it on terms approved of by the government. The proceeds from any disposition of materials must also be credited to the government.

In addition to the Progress Payment Clause, the special tooling contract was subjected to special provisions. These provisions, though analogous to the Progress Payment Clause, are adapted to the circumstance that the special tools, covered therein, do not themselves enter into the final products, but are merely used in the production of those final products. The use of special tools must be in performance of the contract or with prior written approval of the government.

The acquisition of facilities contract is analogous to the spare parts and special tooling contracts, and includes simi-

lar formal title-vesting language. The subject matter of the contract is apparently manufacturing machinery necessary for the performance of the other contracts. There are no provisions for readily disposing of them during the course of the contract. In lieu of provisions for diverting the material itself to other purposes, this contract makes analogous provisions in the event that the use of the machinery is so diverted. Detailed reports must be filed as to use, so that appropriate charges may be made, and thus the Air Force, as under the other contracts, will not be paying in full for items some of which Ford may have used in fulfilling private contracts. Express provision is made that the contract charges for the machinery shall not include any allowance for amortization or depreciation.

The issue of taxability of such property owned by the government, but in possession of a contractor under contracts similar to the Ford contract, has been raised in several recent cases. *City of Detroit* v. *Murray Corp. of America*, 355 U.S. 489, 2 L. ed. 2d 441, was undoubtedly the precursor of the present litigation. In that case the city of Detroit sought to tax property in possession of Murray Corporation under contractual provisions substantially the same as contained in the Ford-Air Force contracts. The United States Supreme Court reversed the United States Court of Appeals and upheld Michigan's right to tax the property in possession of Murray Corporation. The court based its decision on a construction of the Michigan tax statute, stating at 355 U.S. 493: "(T)he taxes involved here imposed a levy on a private party possessing government property which it was using or processing in the course of its own business. It is not disputed that Michigan law authorizes the taxation of the party in possession under such circumstances."

In the *Murray Corp.* case four justices dissented, arguing that the Michigan *ad valorem* property tax was not upon

possessory interests but upon the property owned by the Federal government.

After that decision the Cook County assessor sent a notice to all taxpayers, citing the *Murray Corp.* case and stating that "taxpayers possessing Government personal property should return the value of said property when submitting their personal property schedules."

In the trial court, and on this appeal, however, defendants have abandoned their reliance on the *Murray Corp.* case, conceding that Illinois law does not authorize *ad valorem* taxation of possessory interests in personal property. They claim instead that the real owner of the property is Ford.

The inapplicability of the *Murray Corp.* case is also pointed out in its sequel in the Michigan courts. Relying on *Murray*, the township of Muskegon assessed property in possession of Continental Motors under similar contracts. The Supreme Court of Michigan examined the *Murray Corp.* case and held that the United States Supreme Court had misinterpreted the Michigan statutes. They struck down the tax on the ground that the Michigan tax, like ours, was upon the owner rather than the possessor of property. *Continental Motors* v. *Township of Muskegon*, 365 Mich. 191, 112 N.W.2d 429.

It is clear that the constitution and statutes of Illinois, like those of Michigan, authorize an *ad valorem* tax on personal property, and the "owner" of said property on April 1 shall be liable for the tax. (Ill. Const., art. IX, sec. 1; Ill. Rev. Stat. 1957, chap. 120, par. 499, 509.) However, "property of the United States" is declared exempt from taxation. Ill. Rev. Stat. 1957, chap. 120, par. 500.

Defendants now rely chiefly on *American Motors Corp.* v. *City of Kenosha*, 274 Wis. 315, 80 N.W.2d 363, where the Supreme Court of Wisconsin upheld a tax upon prop-

erty held under such a partial payment contract. The Wisconsin tax statute, however, provided that when personal property "shall be in the charge or possession of some person other than the owner or person beneficially entitled thereto * * * it shall be assessed to the person so in charge or possession of the same." Under such a statute it is understandable that the decision was affirmed by the United States Supreme Court in a *per curiam* memorandum decision with the four dissenters in the *Murray Corp.* case also noting their dissent. *American Motors Corp.* v. *City of Kenosha*, 356 U.S. 21, 2 L. ed. 2d 578.

In similar situations the Supreme Court of California and the Supreme Court of Maryland have denied the State the right to tax such personal property. *General Dynamics Corp.* v. *Los Angeles County*, 51 Cal. 2d 59, 330 P. 2d 794; *Martin Co. v. State Tax Com.*, 225 Md. 404, 171 A. 2d 479.

In the *Martin Co.* case, the court reviewed the *Murray Corp.* decision and stated:

"On the basis of these decisions and *American Motors Corp.* v. *City of Kenosha*, 356 U. S. 21, 78 S. Ct. 559, 2 L. ed. 2d 578 (affirming *per curiam* the decision of the Supreme Court of Wisconsin, reported in 274 Wis. 315, 80 N. W. 2d 363, on the authority of the Murray case), the power of a State and its political subdivisions to tax the interest of the possessor of Government-owned property seems clear, even though here, as in those cases, the economic burden of the tax would fall upon the Government. *Cf. State of Alabama* v. *King & Boozer*, 314 U. S. 1, 62 S. Ct. 43, 86 L. ed. 3; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208, 82 L. ed. 155. The primary question before us, therefore, is not what this State can do, but what it has done.

"In the Murray Corporation case, it seems to have been

assumed in the Supreme Court that title was in the Government, and it was held that the Michigan statute and the city ordinance there involved authorized the taxation of the contractor's right to use and possess the property, and these rights were held subject to taxation. In view of this holding the affirmance by the Supreme Court of the judgment of the Wisconsin Supreme Court in the *American Motors* case on the basis of the *Murray Corp.* case did not, we think, necessarily rest upon the Wisconsin holding as to ownership.

"Ownership is often spoken of as a bundle of rights. Certainly, rights to possess and to use property are important parts of the bundle, but plainly they may be transferred by the owner to another without divesting himself of ownership. That we think is the case here as it was in General Dynamics, and this leads us to the question here, which is very similar to one in that case, do our statutes tax such interests as those of Martin in Government-owned property?"

The court then concluded, as is conceded here, that the State was not authorized to tax the right to use or possess property owned by another.

Other States have also held that property held under similar contracts is property of the United States and thereby immune from State taxation. *Arco Mfg. Corp.* v. *Connelly*, 145 Conn. 161, 140 A.2d 479; *General Motors Corp.* v. *State Tax Com.*, 182 Kans. 237, 320 P. 2d 807; *Craig* v. *Ingalls Shipbuilding Corp.*, 192 Miss. 254, 5 So. 2d 676.

While defendants have pointed out differences in detail between the government contracts involved in the preceding cases, we do not consider them controlling. While the degree of supervision and control, and the methods of disposition of scrap and other property may vary, the essential

pattern is the same. In all the contracts the government has provided for a vesting of title in it, and possession of the property in a contractor for the purpose of performing work for the Federal government under its supervision. We consider the ownership of the Federal government to be real and substantial, although it has given to the contractor some of the bundle of rights of ownership for a specific purpose. (*Cf. Martin Co.* v. *State Tax Com.*, 225 Md. 404, 171 A.2d 479.) We think that this case is unlike *People ex rel. Olmsted* v. *University of Illinois*, 328 Ill. 377, relied upon by defendants. That case involved the taxability of certain farm lands which were conveyed to trustees of the University of Illinois in trust for certain specific purposes. The trustees objected to the assessment of taxes on the property on the ground, *inter alia*, that the property belonged to the State of Illinois. This court held that if an agency of the State holds property as trustee, not for the public, but for specified private persons, such property does not belong to the State so as to exempt it from taxation. *Cf. People ex rel. Gill* v. *Trustees of Schools*, 364 Ill. 131, 136.

Such is not the case here. The United States holds title to the personal property here for the benefit of the public. While it has given to Ford a possessory interest, there is no question as to the capacity in which the government holds title. We do not consider that the *University of Illinois* case aids us in our decision.

We realize that the retention by the government of a mere security or nominal interest does not exempt property from taxation, (*S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558, 90 L. ed. 851; *City of New Brunswick* v. *United States*, 276 U. S. 547, 72 L. ed. 693,) nor does the fact that the burden of the tax will fall upon the United States create immunity. (*Alabama* v. *King & Boozer*, 314 U. S. 1, 86 L. ed. 3.) We are also mindful of the teaching of *Murray*

Corp. that the Federal constitution does not prevent Illinois from taxing the possessory interest of one holding government property.

Nevertheless, there can be no doubt that *McCulloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579, still retains sufficient vitality to prevent a State from levying a direct tax upon the property of the United States without the consent of Congress. (*United States* v. *Allegheny County*, 322 U. S. 174, 88 L. ed. 1209.) It is our conclusion that the present tax is such a direct tax upon property of the United States. Because of this conclusion we need not consider whether a tax upon this property would constitute an unlawful discrimination against the United States.

For the foregoing reasons the decision of the circuit court of Cook County is affirmed.

Decree affirmed.

APPENDIX C.

American Motors Corp., a Maryland corporation, etc., Respondent.

United States of America, Intervening Plaintiff,

v.

City of Kenosha, a municipal corporation, Appellant (three cases).

Supreme Court of Wisconsin.

Jan. 7, 1957.

Rehearing Denied March 5, 1957.

Three actions commenced by plaintiff American Motors Corporation against defendant City of Kenosha for the recovery of 1952, 1953 and 1954 personal property taxes paid under protest. The United States of America intervened as a party plaintiff. From judgments in favor of the plaintiffs, defendant appeals.

The facts will be stated in the opinion.

Robert V. Baker, Kenosha, Aberg, Bell, Blake & Conrad, Madison, Charles P. Seibold, Madison, of counsel, for appellant.

La France, Thompson & Zahn, Racine, Alfred E. La France, Racine, Cook, Beake, Miller, Wrock & Cross, Detroit, Mich., of counsel, for plaintiff and respondent American Motors Corp.

Charles K. Rice, Asst. Atty. Gen., Lee A. Jackson, Lyle M. Turner, H. Eugene Heine, Jr., Attys., Dept. of Justice, Washington, D. C., Edward G. Minor, U. S. Atty., Francis L. McElligott, Asst. U. S. Atty., Milwaukee, for United States.

MARTIN, JUSTICE.

On March 27, 1951, American Motors Corporation (hereafter called the "Company") entered into a contract with the United States Government, Department of the Air Force (hereafter called the "Government") for the manufacture and supply of aircraft engines, repair and replacement parts, overhaul tools, test and ground handling equipment and miscellaneous services and the equipment in connection therewith. This contract, known as a "letter contract," was amended on March 18, 1952 and supplanted on August 29, 1952 by a "definitive contract."

The definitive contract contains a clause which provides in substance that upon the making of any partial payment title to all parts, materials, inventories, work in process and nondurable tools theretofore acquired or produced by the Company for the performance of the contract and properly chargeable to the contract under sound accounting practice, should forthwith vest in the Government, and that title to all like property thereafter acquired or produced by the Company for performance of the contract and properly chargeable as aforesaid should vest in the Government forthwith upon such acquisition or production.

Subs. (d) and (e) of the partial payments clause provide:

> "(d) It is recognized that property (including, without limitation completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Clause will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may

acquire or dispose of property to which title is vested in the Government under this Clause, upon terms approved by the Contracting Officer, provided, that after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination clause of this contract and applicable laws and regulations. The agreed price (in case of acquisition by the Contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer but the proceeds will be applied as provided in this paragraph (d), provided that any such scrap which is a part of termination inventory may be sold only in accordance with the provisions of the termination clause of this contract and applicable laws and regulations. Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Clause shall vest in the Contractor.

"(e) The provisions of this contract referring to 'Liability for Government-furnished Property' and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this clause. The provision of this Clause shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof."

Pursuant to the contract the Company manufactured aircraft engines, etc., in its plant in the city of Kenosha, acquiring a so-called "aircraft engine inventory,' consisting of raw materials, supplies, work in process and completed parts incident to such manufacture. From time to time the Company billed the Government therefor and partial payments were made. The Company, which also manufactured automobiles at its Kenosha plant, kept separate accounts and books with respect to the aircraft engine inventory, physically segregated such inventory and used it for no other purpose.

As of May 1st in the years in question appellant assessed the aircraft engine inventory in the possession of the Company, levied and collected personal property taxes thereon. The lower court held the assessments invalid on the ground that the property in question was owned by the United States Government.

[1] There is no question that property of the Federal Government, in the absence of express congressional consent, is not subject to any form of state taxation.

Sec. 70.18(1), Stats., provides in part:

> "Personal property shall be assessed to the owner thereof, except that when it shall be in the charge or possession of some person other than the owner or person beneficially entitled thereto * * * it shall be assessed to the person so in charge or possession of the same."

The provisions of sec. 70.19 apply to the situation where personal property is assessed "to some person in charge or possession thereof other than the owner or person beneficially entitled thereto," giving such person in charge or possession a right of action "against the owner or person beneficially entitled to such property" for the amount of such taxes.

[2, 3] The question of ownership for tax purposes is one of local law. *Blair* v. *Commissioner*, 1937, 300 U. S. 5, 57 S. Ct. 330, 81 L.Ed. 465. In *United States* v. *Allegheny County, Pa.*, 1944, 322 U. S. 174, 182, 64 S. Ct. 908, 88 L.Ed. 1209, the United States supreme court stated that state law would not be decisive of the question of *title* in the Federal Government, but in many instances title and ownership are two different things, as will be more particularly dealt with hereafter. We will concede that "title" in the property here involved has vested in the Government, as held in *City of Detroit* v. *Murray Corporation of America*, 6 Cir., 1956, 234 F. 2d 380, where the partial payments clause of a contract practically identical with this was construed. We may also assume that federal law with respect to the transfer of tangible property in Wisconsin is not different than Wisconsin law, in the absence of proof to the contrary. No such proof has been made in the present case.

[4] In *State ex rel. Wisconsin Univ. Bldg. Corp.* v. *Bareis*, 1950, 257 Wis. 497, 505, 44 N. W. 2d 259, 263, where title to the real estate in question was in the name of the corporation but the beneficial owner was the State of Wisconsin, it was held that " 'taxation or exemption depends not upon the legal title but on the status of the owner of the beneficial interest in the property.' "

In *Offutt Housing Company* v. *County of Sarpy, Neb.*, 1956, 351 U. S. 253, 76 S. Ct. 814, 819, 100 L.Ed. 1151, where the question was presented whether buildings erected by the corporation upon lands leased from the Government were taxable by the State of Nebraska, the United States supreme court stated:

> "Labeling the Government as the 'owner' does not foreclose us from ascertaining the nature of the real interests created and so does not solve the problem. • • • The Government may have 'title,' but only a paper title • • •."

Similarly, in Corliss v. Bowers, 1930, 281 U. S. 376, 377, 50 S.Ct. 336, 74 L.Ed. 916:

> "* * * taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid."

See, also, Helvering v. Clifford, 1939, 309 U. S. 331, 60 S.Ct. 554, 84 L.Ed. 788.

We are therefore concerned only with the question whether the Company or the Government was the true owner of the property involved.

Under the terms of this contract the Company, in its private capacity, acquires materials needed for performance of the contract. In procuring such materials it does not act as purchasing agent for the Government and the Government incurs no responsibility to the vendor for payment of the purchase price. If a partial payment is made, or has previously been made under the contract, title to all such property vests in the Government upon its acquisition by the Company.

Sub. (d) of the partial payment clause specifically provides:

> "The Contractor, either before or after receipt of notice of termination at the option of the Government, may *acquire or dispose of* property to which title is vested in the Government under this Clause, upon terms approved by the Contracting Officer."

It further provides for payment or credit to the Government account of the amount of the "agreed price" in the case of acquisition by the Company or of the proceeds in the case of "any other disposition." Thus, it appears that the Company's right to acquire or dispose of the property is subject to no restriction, the only requirement being that a price for such acquisition be agreed upon with

the Contracting Officer and the amount involved be paid or credited to the Government as the Officer may direct. It is immaterial, as set forth in the stipulation of facts, that the Company has never acquired or disposed of any of the property as permitted under this clause, since it is the right of the Company thereunder rather than its acts that controls.

Current production scrap may be sold by the Company without approval of the Govenrment. With respect thereto the Company is the sole judge of what materials shall be scrapped, how much, to whom it shall be sold and for what price, providing only that the proceeds be applied in accordance with the Officer's direction.

Upon completion of the deliveries called for by the contract, title to all the property not delivered and accepted by the Government will revert to the Company.

Sub. (e) provides that the Company shall have the complete "risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof."

As stated in 42 Am. Jur., Property:

> "Property * * * is composed of certain constituent elements, to wit, the unrestricted right of use, enjoyment, and disposal of the particular subject of property." Sec. 4, p. 189.
>
> "Both in common parlance and in legal acceptation, he is the owner of property who, in case of its destruction, must sustain the loss of it." Sec. 37, p. 215.

See, also, Brown on Personal Property, sec. 5, pp. 6-7.

[5] In our opinion, the unrestricted right of the Company under the contract to acquire and dispose of the property and the risk of loss are elements of ownership inconsistent with the vesting of such title in the Government as would render the property immune from taxation.

Conceding that title was transferred, there was, however, no true transfer of ownership.

In holding to the contrary in City of Detroit v. Murray Corporation of America, supra, where an identical partial-payments clause was construed, we are not satisfied that the United States court of appeals considered the provisions respecting acquisition and disposition and risk of loss, although it would appear from that opinion that arguments based on those provisions were there advanced. The court considered that the decision in United States v. Allegheny County, Pa., 1944, 322 U. S. 174, 187, 64 S.Ct. 908, 915, 88 L.Ed. 1209, was the controlling authority; it said that all of the arguments made by the City of Detroit were rejected in the Allegheny case. But that case presented no such problem as we are here confronted with. The Government's ownership interest in the property assessed was established by the following facts: One of the machines was manufactured by the contractor, ten of them were furnished by the Government and the remainder were purchased by the contractor from other manufacturers; those bought or built by the contractor were inspected, accepted and paid for by the Government. The case arose when Allegheny County added the value of said machines to the contractor's previously determined assessment for *ad valorem* taxes. The United States supreme court said:

> "We have held that where private interests in property were so preponderant that all the Government held was a naked title and a nominal interest, the whole value was taxable to the equitable owner. Northern Pacific Ry. Co. v. Myers, 172 U. S. 589, 19 S.Ct. 276, 43 L.Ed. 564; City of New Brunswick v. United States, 276 U. S. 547, 48 S.Ct. 371, 72 L.Ed. 693. But that is not the situation here, and the State has made no effort to segregate Mesta's [the contractor's] interest and tax it. The full value of the prop-

erty, including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in Mesta's assessment."

Thus the supreme court distinguished the Allegheny case from cases where the Government holds only a "naked title" and the equitable ownership is in one whose interests are taxable. The Detroit case, purporting to rely on the Allegheny case, does not face the issue of true ownership which is basic to the court's decision in the Allegheny case.

Here the Government has performed no act whatever with respect to the property in the Company's possession except to make partial payments under the contract. It has not as in the Allegheny case, inspected, accepted and paid for it. There was, indeed, no certainty at the time the assessments were made that the property so segregated would be accepted; and the contract provides that title to all such property not eventually delivered and accepted by the Government should vest in the Company. The only regulatory control which the Government has over the property with respect to the Company's right to "acquire and dispose of" it prior to delivery and acceptance, amounts to no more than supervision of the bookkeeping to see to it that the Government is not charged for any of the property so acquired and disposed of. These facts are inconsistent with ownership in the Government.

Counsel for the Company argues that the purpose of the title-vesting provision of the contract was primarily to safeguard the Government against the possibility that its property would be subject to attachment while in the possession of the Company or that its right to immediate possession would be interfered with. Under Title 34 U.S.C.A. § 582 and Title 41 U.S.C.A. §154, the partial-payments provision in a Government contract for supplies creates a lien in favor of the Government which is "paramount to all other liens"

on such supplies, and the Government's title would be sufficient to insure against any interference with its right to possession. The right to freedom from attachment and the right of possession are rights of a secured creditor rather than incidents of ownership.

In any event, no lien for local property taxes would attach in this case because the contract requires the Company to protest and litigate the levying of such taxes and provides that the Company shall be promptly reimbursed by the Government for such taxes assessed against and paid by the Company. And this indicates to us that it was contemplated that in some instances the property would be subject to tax.

As stated in 84 C.J.S., Taxation, § 198, pp. 381-382:

> "• • • the state may tax private property in which the federal government may have an interest, or property the legal title to which is in the United States, but the beneficial ownership in another. • • • This immunity [of the government] rests on the sovereign right of the federal government to hold property tax free, and it grows out of the supremacy of the federal government and the necessity that it be able to deal with its own property free from any interference or embarrassment. • • • The immunity of federal property from state taxation is to be given a practical application so as to attain its purpose, but without unnecessary interference with the right of taxation. It is personal to the government, and is not transferable to, or to be used for, the special protection of the citizen."

See, also, the cases cited therein.

In our opinion true ownership of the property is in the Company and the assessments are therefore valid.

As to other questions raised on this appeal, we agree with the decision in City of Detroit v. Murray Corporation of America, supra.

Judgments reversed and causes remanded with directions to dismiss the complaints.

CURRIE, Justice (dissenting).

I must respectfully dissent from the majority opinion in this case. A grave question of constitutional law is presented in this case because we are confronted by the claim of the United States government, an intervenor in the action, that the city of Kenosha has collected a tax against property of the federal government. Ever since Mr. Chief Justice John Marshall's famous decision in McCulloch v. State of Maryland, 1819, 4 Wheat. 316, 4 L.Ed. 579, it has been the law that no state, or political subdivision thereof, can tax the property or instrumentality of the federal government unless Congress has consented thereto. A clear statement of this doctrine and the underlying reason therefor is stated in Indian Motocycle Co. v. United States, 1931, 283 U.S. 570, 575, 51 S.Ct. 601, 602, 75 L.Ed. 1277, as follows:

> "It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercizes its governmental powers are exempt from taxation by the states, and that the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. [Citing cases.] Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute."

The entire subject of intergovernment tax immunities is reviewed in an article by Prof. B. U. Ratcheford in 6 National Tax Journal 305 (Dec. 1953). The author points out that, while the United States supreme court in recent years has held valid many types of state and local taxa-

tion formerly held to contravene the doctrine of governmental immunity, that court has never allowed a state or local tax to be levied upon property owned by the federal government, or by an agency of it, or which bears directly upon a government activity.

If the contract in the instant case had been entered into by American Motors with the "X" corporation instead of the United States government, I would have no hesitancy in concurring in the opinion as written because of those incidents of ownership in the property in question which inured to the benefit of American Motors in spite of the fact that legal title to such property was vested in the federal government. In such a situation the past interpretation of our property tax statutes would be controlling and no question of federal law would be presented.

The fundamental error, as I view it, is in assuming that the liability for the tax is determinative by Wisconsin and not federal law.

The majority opinion cites Blair v. Commissioner, 1937, 300 U.S. 5, 57 S.Ct. 330, 81 L.Ed. 465, as holding that in a situation such as confronts us on this appeal, Wisconsin decisions govern. That case dealt with a question of federal estate taxation. It involved no question of the immunity from a state tax on the part of the federal government, but was concerned with the interpretation of a trust instrument creating a spendthrift trust to which the government was not a party. The point at issue was whether the beneficiary of the trust could assign his interest under the trust, and under a long line of decisions this is a matter of state and not federal law. See 1 Paul, Federal Estate and Gift Taxation, p. 73, sec. 1.11.

The United States supreme court did, however, declare in State of Alabama v. King & Boozer, 1941, 314 U.S. 1, 9-10, 62 S.Ct. 43, 86 L.Ed. 3, 140 A.L.R. 615, that state law

was determinative of the issue of who is a "purchaser" under an Alabama sales tax statute in a case which involved the question of immunity of the federal government. This statement was repudiated in the recent case of Kern-Limerick, Inc., v. Scurlock, 1954, 347 U.S. 110, 121, 74 S.Ct. 403, 410, 98 L.Ed. 546. In such last mentioned case the court quoted the portion of the opinion in State of Alabama v. King & Boozer, supra, indicating that state law governed, and then stated:

> "Read literally, one might conclude this Court was saying that a state court might interpret its tax statute so as to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign. *Such a conclusion as to the meaning of the quoted words would deny the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest.* The quotation refers, we think, only to the power of the state court to determine who is responsible under its law for payment to the state of the exaction." (Emphasis supplied.)

A further case, which holds that the issue of whether there is an immunity from state or local taxation of property, in which the government claims an interest, presents a question of federal and not state law is United States v. Allegheny County, Pa., 1944, 322 U.S. 174, 64 S.Ct. 908, 913, 88 L.Ed. 1209. This was stated in no equivocal language as follows:

> "Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. *The validity and construction of contracts through which the United States is exercising its constitutional functions, their*

consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State. [Citing cases.]" (Emphasis supplied.)

Because federal and not state law is decisive of the issue here presented, the recent decision of the United States Court of Appeals for the Sixth Circuit in City of Detroit v. Murray Corporation of America, 1956, 234 F.2d 380, is absolutely controlling of the result here. The government subcontracts entered into by the Murray Corporation were for the manufacture of parts and assemblies required by the United States Air Force for the national defense, while in the instant case the government contract entered into with American Motors was for the manufacture by the latter of aircraft engines for the same government agency and for the same purpose. The Murray Corporation subcontracts contained the same partial payment vesting of title clause as did the American Motors contract. In substance such clause provided that upon the making of any partial payment, title to all parts, materials, inventories, work in process, and non-durable tools theretofore acquired or produced by the contractor for the performance of the contract and properly chargeable to the contract under sound accounting practices should *forthwith vest in the Government;* and title to all like property thereafter acquired or produced by the contractor for performance of the contract and properly chargeable as aforementioned should vest in the Government forthwith upon such acquisition or production.

The court in City of Detroit v. Murray Corporation of America, supra, affirmed the judgments of the United States District Court awarding recovery by the corporation of local personal property taxes paid upon materials and parts, title to which had vested in the federal govern-

ment under the partial payment clause of the subcontracts. On the issue of immunity the court strongly relied upon the case of United States v. Allegheny County, Pa., supra, as appears from the following extract taken from the opinion, 234 F.2d at pages 382-383:

> "Upon analysis, we think that substantially all of the arguments advanced by appellant were rejected by the Supreme Court in the Allegheny case. The Supreme Court declared that the principle is unshaken, indeed rarely questioned, that 'possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation.' 322 U.S. 177, 64 S.Ct. 911."

The majority opinion herein seeks to distinguish the Allegheny case from the instant one on the ground that the government in the latter has but bare legal title in the property attempted to be taxed. This totally ignores the self-evident purpose of the partial payment clause, and certain provisions of such clauses. The contract with American Motors was entered into during the Korean conflict when the government desperately needed aircraft engines. The government obviously wished to be sure that any materials and parts procured by American Motors for performance of the contract would not be diverted to any other purpose without its consent. Thus, if American Motors should for any reason default on its contract, the government could step in and use the materials and parts on hand toward completion of the contract. The right of control retained by the government made its ownership far more than a bare legal title.

The majority opinion quotes a statement from the opinion in Offutt Housing Company v. County of Sarpy, Neb., 1956, 351 U.S. 253, 76 S.Ct. 814, 819, 100 L.Ed. 1151, that the government may have "only a paper title," the inference being that such paper title would

not confer immunity from state taxes. An examination of such case discloses that it clearly is not in point here. There, land owned by the federal government was leased to the plaintiff housing company at a nominal rental for seventy-five years under the Wherry Military Housing Act, 12 U.S.C.A. §1748 et seq., the company to erect buildings and improvements thereon to provide adequate housing for personnel of an Air Force base in Nebraska. The county assessor sought to assess the improvements, fixtures and furniture of the plaintiff as subject to state and county personal property taxes. Two issues were presented to the United States supreme court: (1) Whether Congress had consented to the state, or its subdivisions, taxing such property, and (2) if such consent were found to have been given, could the entire value of such improvements, fixtures and furniture be taxed to plaintiff without any diminution of such value because of the government's interest therein. The majority opinion held that Congress had given its consent, and this holding removed from the case the issue of immunity from tax. On the second question of valuation, the court determined that the government had merely bare legal title for purposes of security only, similar to that of a mortgagee, which did not prevent the full value being assessed against the lessee.

The applicable inference to be drawn from the majority opinion in the Offutt Housing Co. case, for the purposes of the instant case, is that, if the court had not construed the Wherry Housing Act as granting permission to the state to tax the lessee's interest in the property, there would have been an immunity from state and local taxes.

For the reasons stated herein, and in the able memorandum opinion of the learned trial judge, the judgment should be affirmed.

APPENDIX D.

Consolidated-Hammer Dry Plate & Film Company, Transferee, Petitioner,

v.

Commissioner of Internal Revenue, Respondent.

No. 14019.

United States Court of Appeals Seventh Circuit.

May 21, 1963.

Maurice P. Raizes, Chicago, Ill., for petitioner.

Louis F. Oberdorfer, Asst. Atty. Gen., Stephen Wolfberg, Attorney, Tax Division, U. S. Dept. of Justice, Washington, D. C., Lee A. Jackson, Melva M. Graney, Michael I. Smith, Attorneys, Department of Justice, Washington, D. C., for respondent.

Before HASTINGS, Chief Judge, and SCHNACKENBERG and KNOCH, Circuit Judges.

SCHNACKENBERG, Circuit Judge.

Consolidated-Hammer Dry Plate & Film Company, Transferee, a Delaware corporation (hereinafter referred to as the taxpayer), has by its petition in this court sought a review of the decision of the Tax Court of the United States in a case involving alleged deficiency in the payment of federal income taxes by Consolidated Photo Engravers and Lithographers Equipment Company, an Illinois corporation (herein referred to as Photo Engravers), for the

taxable periods ending November 30, 1950 and August 31, 1951, which were assumed by taxpayer through a merger on the latter date.

In November, 1949, Photo Engravers entered into a contract with the United States Air Force for the construction of a large vertical test camera at a contract price of $39,300.

Photo Engravers also entered into two other contracts with the Air Force in May 1950 and April 1951, as well as a contract with the Corps of Engineers, United States Army, in February 1951, all for construction of various equipment.

All of the contracts entered into by Photo Engravers with the armed services contained, *inter alia*, the following general provisions:

> "2. Changes
>
> "The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery * * *.
>
> * * * * *
>
> "7. Payments
>
> "The Contractor shall be paid, upon the submission of properly certified invoices or vouchers, the prices stipulated herein for supplies delivered and accepted or services rendered and accepted, less deductions, if any, as herein provided. Unless otherwise specified, payment will be made on partial deliveries accepted by the Government when the amount due on such deliveries so warrants; or, when requested by the Contractor, payment for accepted partial deliveries shall be made whenever such payment would equal or

exceed either $1,000.00 or 50% of the total amount of this contract.

* * * * *

"Partial Payments—Partial payments, which are hereby defined as payments prior to acceptance on work in progress for the Government under this contract, may be made upon the following terms and conditions.

"(a) The Contracting Officer may from time to time, authorize partial payments to the Contractor upon property acquired or produced by it for the performance of this contract: Provided, that such partial payments shall not exceed 75% of the cost to the Contractor of the property upon which payment is made, which cost shall be determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer: Provided further, that in no event shall the total of unliquidated partial payments (see (.) below) and of unliquidated advance payments, if any, made under this contract, exceed 80% of the total contract price of supplies still to be delivered.

"(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and nondurable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production: Provided, that nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder; or relieve the Contractor or the Government of any of their respective rights or obligations under this contract.

"(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract

price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained."

Purauant to the partial payment provisions of these contracts, Photo Engravers submitted invoices and received amounts thereon.

Respondent, the Commissioner of Internal Revenue (hereinafter referred to as Commissioner), has determined that all of the partial payments constituted income *upon receipt* thereof, and the Tax Court in effect so held. On the other hand, taxpayer contends that it was proper to report the partial payments as income *only when delivery and acceptance of the products were made.*

Thus in conformity with that position, taxpayer reported, as a part of its income in 1951, when delivery of the items was made, partial payments received in 1950 on the November 1949 contract.

1. Photo Engravers was an accrual basis taxpayer. The clause in the contract providing for partial payments reads that the Contracting Officer *may* authorize such payments. When made, such payments were subject to certain requirements for completing the sale, such as drop tests and environmental tests, which rendered every such contract subject to changes and revisions as recommended by the government.[1]

The amounts of partial payments are rigidly limited by the terms of the contracts as above set forth. In addition

1. The contracts incorporated various detailed provisions including the following:

"5. Inspection

"(a) All supplies (which term throughout this clause includes without limitation raw materials, components, intermediate assemblies, and end products) shall be subject to inspection and test by the Government, to the extent practicable at all times and places including the period of manufacture, and in any event *prior to final acceptance.*" (Italics supplied.)

the government when it makes any partial payment under such a contract continues to hold and indeed to take title to, not only the work produced as covered by the invoices upon which the partial payment is based, but to parts, materials, work in process and tools thereafter acquired or produced. This provision of course applies not only to the goods covered by the invoices and the partial payment, but also to future acquired goods and property.[2] This provision for the granting of title to the government for materials, work in process and tools, not being limited to those then in possession of the contractor, but being specifically extended to such as may be produced or acquired in the future, is characteristic of the security frequently taken by a creditor, who makes advancements. It is suggestive of the incidents of a program of financial assistance to small business concerns, such as is provided by the Small Business Administration under 15 U. S. C. A. § 631 et seq., and other federal legislation. The similarity is accentuated by a reference to 10 U. S. C. A. § 2307, which, in referring to procurement from small concerns by the various agencies of the government, explicitly authorizes the head of any agency to make advance or partial payments upon security "in the form of a lien * * * on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree." See also 41 U. S. C. A. § 255.

[1] While taxpayer makes no contention that these acts are expressly applicable to the transactions involved in the case at bar, we believe that the same congressional purpose of assisting concerns dealing with the procurement officers of the defense department is present here. The language of

2. The partial payments clause provides that its provisions "shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof."

the contract before us to the effect that the title to goods, not in existence at the time a partial payment is made, passes to the government upon acquisition of property subsequently to the date of the partial payment, supports the taxpayer's contention that this partial payment plan has the attributes of a financing arrangement. It is apparent that the parties to the contract realized that Photo Engravers would require partial payments to help finance the numerous expenditures to be involved in the performance of the contract. The partial payments were payments "prior to acceptance" of the finished product. They were attributes of a financing arrangement in the nature of a loan and the proceeds of a loan do not constitute taxable income.

[2] It is our conclusion that the partial payments were reportable as accrued income for income tax purposes only when delivery and acceptance of the products were made.

The Tax Court evidently failed to agree with this view. The Commissioner contends that, "once its invoices were approved," taxpayer "had an unrestricted right to receive the amounts in fact received under a claim of right during the taxable periods in question and, therefore, under well-settled principles, the partial payments were income to Photo Engravers at that time." However, there is no evidence[3] that any inspection or tentative approval was given for any of the items shown on the invoices for partial payments, nor that the sum of partial payments was matched with progress being made under the contract. To the contrary, the evidence showed that *after* the partial payments were received, the invoices were found to be erroneous. The contract fixed the time for inspection and test by the government "in any event" as "prior to final acceptance," *post* 4, rather than by any reference to the time of partial payments.

3. With the exception of an initial delay occasioned by the reaching of an agreement between the parties on a *prototype* printer.

When the product was finished and accepted, the day of reckoning had arrived. Until then the right of the taxpayer to retain any partial payments on account was conditional or tentative.

The Commissioner also argues that "the fact that such [partial] payments may thereafter have to be returned is immaterial." He relies on Healy v. Commissioner, 345 U. S. 278, 73 S.Ct. 671, 97 L.Ed. 1007; North American Oil Consolidated v. Burnet, 286 U.S. 417, 52 S.Ct. 613, 76 L.Ed. 1197; and Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 77 S.Ct. 707, 1 L.Ed. 2d 746; as well as our holding in Phillips v. Commissioner, 7 Cir., 238 F.2d 473. The vitality of the claim of right doctrine seems inscrutable in view of American Automobile Association v. United States, 367 U.S. 687, 81 S.Ct. 1727, 6 L.Ed.2d 1109.[4]

All of these cases involved income under *service* contracts or the payment of *net profits* earned from a property during a receivership. In the case before us we are confronted with income from *sales of property.* While observance of this distinction is not controlling in our thinking, it has substantial recognition, as stated in Mertens' Law of Federal Taxation, Vol. 2, p. 359:

> "§ 12.118. When Income from Sales of Property Is to Be Reported. Contracts for the sale of property differ so widely, according to the nature of the property fer so widely, according to the nature of the property which is the subject of sale and the varying complexities surrounding the passing of title and the terms of payment, that it is necessary to use with caution each decision in which the year for reporting the income is determined. The basic question is always to determine *when a sale is made.* * * *"

4. Some of the legal periodicals have raised the question of whether the holding in this case has been an abandonment of the doctrine of the "Claim of Right." 47 American Bar Association Journal, 1218, 1219; 47 Cornell Law Quarterly, 475, 478; 61 Michigan Law Review, 148, 162.

In this court the Commissioner remains silent as to United States v. Harmon, 10 Cir., 205 F.2d 919 (1953), upon which taxpayer relies. In that case Harmon, an accrual basis taxpayer, on November 12, 1943, executed a certificate of completion of his work on three governmental projects, but the execution of certificates of completion by various governmental employees successively was not completed until January 4, 1944. In December, 1943, Harmon honored a change order approved by the government authorizing increased wages, and on January 11, 1944 Harmon sent claims for reimbursement for these amounts, the payment of such claims to the subcontractor being authorized in February 1944. These claims were paid by the government in February 1944. Final audits were made and the amount due Harmon was determined. As a result of the audit, overcharges on use of equipment and other items were disallowed and deducted from Harmon's retained fixed fee. On May 16, 1944 the remaining balance of the fixed fee was paid. The question in the case was whether this income should have been returned in Harmon's 1943 return or whether it was properly reurned by him in his 1944 return. At 921, the court said:

> * * * At the end of 1943, Harmon's interest in the retained portion of the fixed fee was subject to proper set-offs and deductions, if any, which might be revealed by the final audits. A number of things remained to be done upon which the determination of that amount depended. The audits had not been completed. The outstanding claims had not been paid. Harmon's right to be credited with all these claims had not been finally determined. These matters were not determined until in 1944 and until that was done Harmon's interest in the amount of fixed fee remaining in the Government's hands was not established with finality and certainty. * * * An unconditional liability on the part of the Government to pay Harmon a fixed and definite sum did not arise in 1943. As pointed out, it could not arise

until all audits had been completed and an adjustment with respect to claims had been made and this did not occur until 1944 and as a result no income tax liability arose with respect to the amount in question until in 1944."

The Tax Court has followed Harmon in Marquardt Corporation, 39 T.C. No. 42, 1, 14.

2. Taxpayer raises the question of whether an addition of $4,676.93 to a reserve for bad debts by Photo Engravers for the year ending November 30, 1950, was, as the Tax Court held, unreasonable and hence not deductible. It further contends that the Commissioner's action in disallowing the deduction was arbitrary. The Commissioner states that what is a reasonable addition is a question of fact.

[3-5] Taxpayer seeks to justify this addition by pointing to the fact that *in 1953* it wrote off bad debts to the extent that the bad debt reserve was depleted. Where such an addition has been challenged by the Commissioner as being unreasonable the taxpayer has the heavy burden of sustaining the deductibility thereof. American State Bank of United States, 7 Cir., 279 F. 2d 585, 590. The anticipated losses to which the addition to the reserve is to apply must be judged by the contemporaneous conditions. There is no showing in the case at bar that losses were probable if viewed at the time the addition was made and computed. This is bolstered by the fact that Photo Engravers experienced no bad debts during the period December 1, 1946 to November 30, 1950, even though it had a reserve for bad debts in the amount of $3,017.37 during that period.

We find no error by the Tax Court in its ruling on the addition to the reserve for bad debts.

3. Although Photo Engravers' income tax return for the period ending August 31, 1951 was due to be filed on or before November 15, 1951, an extension was granted to

January 15, 1952. Without a further extension having been granted, said return was not filed until February 25, 1952. Because of said dereliction the Commissioner assessed an addition to the tax, which was sustained by the Tax Court.

In this court taxpayer contends that the evidence shows that it is a small corporation, whose president had the responsibility of numerous duties, and that taxpayer itself was in the midst of much turmoil. The president testified that he thought a further extension had been obtained.

[6] Taxpayer's counsel urges that there is a question of doubt as to whether taxpayer's default was the result of the failure to exercise ordinary business care and prudence, and therefore a well known principle of law applies: "All questions in doubt must be resolved in favor of those from whom the penalty is sought". He cites Hatfried, Inc., v. Commissioner, 3 Cir., 162 F. 2d 628 (1947). We find in these facts no excuse for failure to file within the extended time. In Hatfried no return was filed, because of advice from the taxpayer's accountant after full disclosure of the facts. In the case at bar the omission was intentional and taxpayer made no further effort to secure another extension of time for filing its return. The Tax Court did not err in this respect.

In Accordance with the views herein expressed, the decision of the Tax Court is reversed in part and affirmed in part, subject to recomputation by the Tax Court of said addition to tax, imposed under § 291 of the Internal Revenue Code of 1939.

Decision affirmed in part and reversed in part.

APPENDIX E.

AMERICAN MOTORS CORP. ET AL. *vs.* CITY OF KENOSHA.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 343. Decided March 10, 1958.

274 Wis. 315, 80 N. W. 2d 363, affirmed.

Solicitor General Rankin, Assistant Attorney General Rice, John N. Stull, A. F. Prescott and H. Eugene Heine, Jr., for the United States, and *Alfred E. LaFrance* for the American Motors Corporation, appellants.

PER CURIAM *Wm. J. P. Abert* and *Robert V. Baker* for appellee.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON, MR. JUSTICE HARLAN, and MR. JUSTICE WHITTAKER dissent for the reasons set forth in their dissenting opinions in *City of Detroit* v. *Murray Corp.*, 355 U. S. 489, 495, 505, 511, decided March 3, 1958.